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THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

ALASKA COMMUNITY ACTION ON TOXICS, *et al.*,

Plaintiffs,

v.

AURORA ENERGY SERVICES, LLC, *et al.*,

Defendants.

Case No. 3:09-CV-00255-TMB

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The fundamental premise of the Federal Water Pollution Control Act, (hereinafter "CWA" or "the Act") is that "the discharge of any pollutant by any person shall be unlawful," except as otherwise permitted under the Act. 33 U.S.C. § 1311(a). Plaintiffs Alaska Community Action on Toxics and the Alaska Chapter of the Sierra Club (collectively "ACAT") bring this CWA citizen suit enforcement action against Defendants Aurora Energy Services, LLC ("AES") and Alaska Railroad Corporation ("ARRC") to stop their illegal, unpermitted discharges of coal from the Seward Coal Loading Facility ("SCLF" or "the facility") into waters of the U.S., including ponds, wetlands and Resurrection Bay ("the Bay"). *See* Complaint (Doc. 1) at ¶¶ 1, 48-75.

The only CWA permit Defendants currently have for the SCLF is coverage under the Multi-Sector General Permit for Stormwater Discharges ("Stormwater Permit" or "MSGP"). *See* Exs. 1[1] and 2[2]. However, the discharges of coal at issue in this suit are non-stormwater discharges, which specifically are not covered under the Stormwater Permit. Because Defendants have ongoing discharges of coal into Resurrection Bay and/or ponds and wetlands, they must obtain a CWA permit for those discharges. ACAT seeks an order from the Court enjoining Defendants from continued violations of the CWA by requiring that Defendants secure – and comply with – a permit for those discharges.

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[1] Multi-Sector General Permit for Stormwater Discharges Associated With Industrial Activities (May 27, 2009). On May 15, 2009, AES submitted to EPA its notice of intent to discharge stormwater from the facility under the General Permit. *See* Mot. for JOP at 4, n.16 (referencing Exhibit J to Mot. for JOP (Doc. 40-18)).

[2] Letter from EPA to Bartly Coiley, Manager, Environmental Affairs, AES (April 6, 2009).

II. STANDARD OF REVIEW

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, a moving party is entitled to summary judgment as a matter of law which "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." *Bhan v. NME Hosp's. Inc.,* 929 F.2d 1404, 1409 (9th Cir. 1991), *cert. denied*, 502 U.S. 994 (1991). If the moving party shows that there are no genuine issues of material fact, the non-moving party must go beyond the pleadings and designate facts showing an issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The movant is not required to present evidence, but should identify areas where there is a lack of any genuine dispute as to any material fact. *Celotex Corp.,* 477 U.S. at 323-325. There is no genuine issue of material fact when the relevant facts, "taken as a whole, indicate[] that a reasonable fact-finder could not find for the nonmoving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

A genuine issue of material fact is one that would change the outcome of the litigation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). "The burden on the moving party may be discharged by 'showing' – that is, pointing out to the [Court] – that there is an absence of evidence to support the non-moving party's case." *Sweats Fashions, Inc. v. Pannill Knitting Co., Inc*., 833 F.2d 1560, 1563 (Fed. Cir. 1987). "A scintilla of evidence, or evidence that is merely colorable or not significantly probative, does not present a genuine issue of material fact." *United Steelworkers of America v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542 (9th Cir. 1989), *cert denied* 493 U.S. 809 (1989). The substantive law governing a claim or defense determines whether a fact is material. *T.W. Eled. Serv., Inc. v. Pacific Elec. Contractors Ass'n.*, 809 F.2d 626, 630 (9th Cir. 1987).

Once the moving party has met its burden, the non-movant may not rest on mere allegations, but must instead proffer specific facts showing that a genuine issue exists for trial.

Matsushita Elec. Indus. Co., 475 U.S. at 586. Thus, to avoid summary judgment, the Plaintiff must present some objective evidence that would enable the Court to find he is entitled to relief. In *Celotex Corp. v. Catrett*, the Supreme Court held that, in responding to a proper motion for summary judgment, the party who bears the burden of proof on an issue at trial must "make a sufficient showing on an essential element of her case" to establish a genuine dispute. 477 U.S. at 322-23.

In *Anderson* the Supreme Court explained under what circumstances summary judgment is appropriate:

> If the evidence is merely colorable, . . . or is not significantly probative, . . . summary judgment may be granted . . . [T]he mere existence of a scintilla of evidence in support of the Plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the Plaintiff.

Anderson, 477 U.S. at 252; *see also Laningham v. U.S. Navy*, 813 F.2d 1236, 1242 (D.C. Cir. 1987) (non-moving party is "required to provide evidence that would permit a reasonable jury to find" in its favor). In *Celotex*, the Supreme Court further instructed that the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Anderson*, 477 U.S. at 327 (*quoting* F.R.C.P. 1).

III. LEGAL FRAMEWORK OF THE CLEAN WATER ACT

The primary objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this objective, Congress established certain goals, including: (1) to eliminate the discharge of pollutants into the navigable waters by 1985; (2) to attain water quality which can provide for the protection and propagation of fish, shellfish, and wildlife and provide for recreation both in and on the water by July 1, 1983; and (3) to prohibit the discharge of toxic pollutants in toxic amounts. 33 U.S.C. §

1251(a)(1)-(3). To achieve these ends, "[o]ne of [the Act's] principal provisions prohibits the unpermitted discharge of pollutants into 'navigable waters.'" 33 U.S.C. § 1311(a). *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 704 (9th Cir. 2007).

Specifically, Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the "discharge of any pollutant by any person" into waters of the United States except in compliance with the terms of a permit, such as a National Pollution Discharge Elimination System ("NPDES") Permit issued by the EPA or an authorized state pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. Section 505 of the CWA provides that "[A]ny citizen may commence a civil action on his own behalf against any person … who is alleged to be in violation of an effluent standard or limitation under this chapter …." 33 U.S.C. § 1365(a)(1)(A). "Effluent standard or limitation" includes "an unlawful act under subsection (a) of Section 301 of this title," including the prohibition against unpermitted discharges. 33 U.S.C. § 1365(f)(1). Thus, citizens may enforce any violation of effluent limitations, water quality standards, or general permit conditions in a NPDES permit. *See Northwest Envtl. Advocates v. City of Portland*, 56 F.3d 979, 986 (9th Cir. 1995).

The CWA imposes strict liability for violations of NPDES permit program requirements. The discharger's good faith is not relevant to the issue of liability. *See, e.g., Save Our Bays and Beaches v. City and County of Honolulu*, 904 F. Supp. 1098, 1105 (D. Haw. 1994) ("The Act imposes strict liability for NPDES violations. The Act does not allow for 'de minimis' or 'rare' permit violations, and the permit holder's good faith is not relevant to the issue of liability.") (footnote omitted); *Citizens for a Better Environment-California v. Union Oil Co. of California*, 861 F. Supp. 889, 898 (N.D. Cal. 1994), *aff'd*, 83 F.3d 1111 (9th Cir. 1996), *cert. denied*, 519 U.S. 1101 (1997).

To establish a violation of the prohibition against unpermitted discharges, plaintiff must prove that defendants (1) "discharged" or "added," (2) a "pollutant," (3) from a "point source," (4) into "navigable waters of the United States," and (5) the discharge was not authorized by a NPDES permit. 33 U.S.C. § 1311(a); *see* 33 U.S.C. § 1342, *Comm. to Save Mokelumne River v. East Bay Util. Dist.*, 13 F.3d 305, 308 (9th Cir. 1993); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532 (9th Cir. 2001).[3]

Under the Act, the "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). An "addition" is the introduction of a pollutant into navigable water. *See Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001); *see also Rybachek v. EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990) (upholding the EPA's interpretation of "addition" to include re-depositing material from the streambed into the stream as well as depositing material from outside the stream).

The Act defines "pollutant" as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6); *see also* 40 C.F.R. § 122.2. The legislative history clearly demonstrates that "pollutant" is to be broadly interpreted. S. Rep. No. 92-414, at 76 (1972).[4]

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3 "[A] citizen group has 'standing to seek penalties for violations that are ongoing at the time of the complaint and that could continue into the future if undeterred.'" *Headwaters, Inc.*, 243 F.3d at 529 *citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167 (2000) and *Russian River Watershed Prot. Comm. v. City of Santa Rosa,*142 F.3d 1136, 1143 (9th Cir. 1998) ("appellants must prove the existence of ongoing violations or the reasonable likelihood of continuing future violations").

4 *See also* Rodgers, William H., Jr. *Environmental Law: Air and Water.* 2 vols. St Paul, Minnesota: West Publishing Co., 1986 at 144 ("This laundry list of 'bads' endorses an

The Act defines "navigable waters" as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The EPA has further defined "the waters of the United States" to include "all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." 40 C.F.R. § 122.2.

The Act defines "point source" as:

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

33 U.S.C. § 1362(14); *see also* 40 C.F.R. § 122.2. The legislative history for the CWA makes clear "that the term 'point source' was not to be interpreted narrowly." *See Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1071-72 (9th Cir. 2011) (quoting H.R.Rep. No. 92–911, at 125 (1971) and S.Rep. No. 92–414, at 51 (1971), 1972 U.S.C.C.A.N. 3668, 3760). Legislative history further establishes that Congress "sought to require permits for any activity that met the legal definition of 'point source,' regardless of feasibility concerns." *Id*. at 1072 (quoting 118 Cong. Rec. 10765 (Mar. 29, 1972)).

Congress amended the CWA in 1987 to address stormwater discharges by adding § 402(p) "Municipal and Industrial Stormwater Discharges." *Environmental Defense Center, Inc. v. U.S. E.P.A.*, 344 F.3d 832, 841 (9th Cir. 2003). Section 402(p) lists five categories of storm water discharges for which NPDES permits are required, including discharges "associated with industrial activity." 33 U.S.C. § 1342(p)(1)-(2).

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understanding of a pollutant as a 'resource out of place.' The congressional purpose was to identify and anticipate all of the physical 'stuff' that could end up in the wrong place to the detriment of water quality [absent] an indisputable catch-all, there is little doubt that the recitation of the definition of "pollutant" is designed to be suggestive not exclusive.").

In 1990, EPA promulgated regulations for the stormwater discharges specified in § 402(p). 55 Fed.Reg. 47990 (Nov. 16, 1990); 40 C.F.R. § 122.26. EPA's regulations define stormwater as "storm water runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13). Stormwater discharges associated with industrial activity are defined as "the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant." 40 C.F.R. § 122.26(b)(14).

The CWA's stormwater regulations require "[d]ischargers of storm water associated with industrial activity . . . to apply for an individual permit or seek coverage under a promulgated storm water general permit." 40 C.F.R. § 122.26(c)(1). Where non-stormwater discharges are or may be combined with stormwater discharges, those non-stormwater discharges cannot be authorized under an individual or general stormwater permit. Instead, those non-stormwater discharges must be covered under a separate NPDES permit. *See* 40 C.F.R. § 122.26(c)(1) (requiring that the operator of an industrial stormwater discharge provide, as part of a storm water permit application, a "certification that all outfalls that should contain storm water discharges associated with industrial activity have been tested or evaluated for the presence of non-storm water discharges *which are not covered by a NPDES permit*") (emphasis added); *see*, *also*, *Ecological Rights Found. v. Pac. Lumber Co*., 230 F.3d 1141, 1145 n.1 (9th Cir. 2000) (defining non-stormwater discharge as "any discharge to storm sewer systems that is not composed entirely of storm water *except discharges pursuant to a NPDES permit* and discharges resulting from fire fighting activities" (emphasis added). Accordingly, any discharge from an industrial facility that is not "storm water runoff, snow melt runoff, [or] surface runoff and drainage" (40 C.F.R. § 122.26(b)(13)) cannot be covered under an individual or general storm water permit, but must receive authorization under a separate NPDES permit.

In addition to providing for enforcement by state agencies and the EPA, the Act also confers jurisdiction on the federal courts to hear citizen suits brought against any person "alleged to be in violation of" the Act.[5] 33 U.S.C. § 1365(a); *see Nw. Envtl. Advocates v. City of Portland*, 56 F.3d 979, 986 (9th Cir. 1995). This includes violations of the prohibition in Section 301(a) of the Act against "the discharge of any pollutant by any person" unless authorized by a permit. 33 U.S.C. § 1311(a).

IV. STATEMENT OF MATERIAL FACTS

A. The Seward Coal Loading Facility.

The SCLF is located on the northwest shore of Resurrection Bay in Seward, Alaska. ARRC Answer (Doc. 14) at ¶ 27; *see* Ex. 3[6]; Ex. 4[7] at 41. ARRC purchased the SCLF in 2003. *See* Defendants' Motion for Judgment on the Pleadings ("Mot. for JOP") (Doc. 40) at 7. AES first assumed operational control of the SCLF on January 8, 2007. *Id*.

The ARRC transports coal, via railcar, from the Usibelli Coal Mine near Healy, Alaska, to the SCLF. AES Answer (Doc. 15) at ¶ 28. When ARRC trains arrive at the SCLF, the coal is offloaded from the railcars at the railcar unloader and stored in two coal stockpiles. *Id*. at ¶ 29. The coal stockpiles run in a north-south direction. Ex. 4 at 41. The average size of the coal stock pile is 90,000 to 95,000 tons. Ex. 5[8] at 1. AES states that the stockpile capacity is 140,000 tons

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5 At least 60 days prior to filing, the prospective plaintiff must provide notice of its claims to the potential defendant, the EPA, and the state in which the violations allegedly occurred. *See* 33 U.S.C. § 1365(b)(1)(A). If a competent state or federal agency brings a civil enforcement action against the defendant prior to the citizen's complaint being filed, or an administrative enforcement proceeding prior to the plaintiff's NOI letter, the citizen suit is preempted and must be dismissed. *See* 33 U.S.C. §§ 1365(b)(1)(B), 1319(g)(6). In this case, proper notice was given and no such enforcement action or proceeding has been initiated by the State or EPA.

6 Usibelli Coal Mine aerial photo of SCLF.

7 Facility photos provided in the SCLF SWPPP.

8 Facility fact sheet (Feb. 17, 2010).

(Ex. 6[9]), although, at times, the stockpile has been as large as 156,400 metric tons. Ex. 7[10]. The coal stockpiles have been reported to be as large as 75-100 feet tall, 100 feet wide and 1000 feet long. Ex. 8[11] at 2. The coal stockpiles are approximately 1,300 feet from the shoreline of Resurrection Bay. *See* Declaration of Steven Klafka, P.E., BCEE, In Support of Plaintiffs' Motion for Summary Judgment ("Klafka Decl.") (filed concurrently) at ¶ 9. The railcar unloader is approximately 2,300 feet from the shoreline of Resurrection Bay. *Id*.

The SCLF has 14 belt conveyor ("BC") systems that move coal from the railcar unloader to the stockpiles and from the stockpiles to the ship loader. Ex. 9[12] at 12; *see also* Ex. 10.[13] Conveyors BC 1-13 move the coal from the railcar unloader to the stacker/reclaimer. Deposition of Victor Stoltz ("Stoltz Depo."), Ex. 11 at (24:18-25, 25:6-14). The stacker/reclaimer either stacks coal in the stockpiles or reclaims coal from the stockpiles and places that coal on conveyor BC 13. *Id*. at (25:9-14, 25:21-25, 26:1-3). The stacker/reclaimer consists of a 6-foot wide boom conveyor that loads coal from the conveying system to the stockpiles and the reclaimer. Ex. 9 at 13. The reclaimer is a bucket wheel with a diameter of approximately 18 feet and includes eight buckets to scoop the coal. *Id*. The scooped coal is loaded through a chute back onto the boom conveyor which delivers the coal onto conveyor BC 13. *Id*.

Conveyor BC 13 then moves the coal southward to a transfer point located near the control room where coal is transferred onto BC 14. Ex. 11, Stoltz Depo. at (26:6-9). Conveyor BC 14 is approximately 1,500 feet long. Ex. 12.[14] At times, coal is transferred directly from the

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9 E-mail from Rob Brown to Bartly Coiley (March 31, 2009).

10 E-mail from Victor Stoltz to Paul Farnsworth (April 30, 2010).

11 Dec. 27, 2010 Alaska Department of Environmental Conservation ("DEC") Inspection report.

12 AMEC report, Ventilation Evaluation and Recommendations, July 9, 2007.

13 AES schematic of conveyor system.

14 E-mail from Ed Douberly to Rob Brown (July 24, 2010).

railcars to a ship without intervening storage in the coal stockpiles. Mot. for JOP at 7. The ship loader system consists of a tower mounted on a center post (Tower 14) with a ship loader feeder conveyor and chute, boom conveyor, shuttle conveyor and telescopic chute installed just below the shuttle conveyor. Ex. 9 at 14; Ex. 10. Each vessel receiving coal from the SCLF is loaded with approximately 45,000-75,000 tons of coal to be carried to foreign markets. AES Answer (Doc. 15) at ¶ 29. In 2011, AES loaded seventeen vessels with a total of 1,036,949 metric tons of coal. *See* Ex. 13.[15] In 2012, AES anticipates exporting a similar volume of coal out of the SCLF. *See* Ex. 14, Brown Depo. at 30:13.

The predominant wind direction in winter months in Seward is from the north. *See* Ex. 9 at 1; *see also* Klafka Decl. at ¶ 8 (noting that winds come from the north 43% of the year). The total percentage of wind speeds greater than 10 knots (11.5 mph) is 27%, compared to calm winds (less than a knot) found 24.2% of the time. *Id*. Winds blowing from the north carry airborne coal dust southward in the direction of Resurrection Bay. *See* Ex. 4 at 41. Winter tends to be the busiest season for the SCLF, based upon the coal-loading history. Ex. 26 at 3.

The SCLF ship loader is to the south of the coal stockpiles and located over Resurrection Bay. *Id*. In addition to winds from the north, winds from other directions can carry coal dust created during ship loading towards Resurrection Bay, as the ships are docked approximately 1,700 feet out from the northern shore of Resurrection Bay and are surrounded by open water. Ex. 15[16] at 7. Wind speeds are relatively high, especially during the winter months. *See* Klafka Decl. at ¶ 8. The Alaska Department of Environmental Conservation ("DEC") has noted that Seward "gets winds gusting to 60 mph on a regular basis." Ex. 8 at 1.

Coal dust routinely leaves the SCLF boundaries. In a December 2010 inspection, after improvements had been made to the Facility in response to Notices of Violation issued by DEC,

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15 AES Monthly Operation Reports for 2011.

16 Seward Coal Handling Facility Project Description.

DEC noted that "[e]ven with all the current precautions in place, coal dust has the potential to be blown off the large piles or from the rail car unloading building during high wind conditions …." Ex. 8 at 3.

B. The SCLF Stormwater General Permit.

Since 2001,[17] AES, the operator of the SCLF, has been authorized under the Multi-Sector General Permit to discharge "storm water associated with industrial activities."[18] *See* Ex. 1 at 6; *see also* Ex. 16[19] at 18-19. "Stormwater associated with industrial activity" is defined as:

> the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. . . . For the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from industrial plant yards; immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility; material handling sites; refuse sites; sites used for the application or disposal of process waste waters (as defined at part 401 of this chapter); sites used for the storage and maintenance of material handling equipment; sites used for residual treatment, storage, or disposal; shipping and receiving areas; manufacturing buildings; storage areas (including tank farms) for raw materials, and intermediate and final products; and areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water. For the purposes of this paragraph, material handling activities include storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product, by-product or waste product.

40 C.F.R. § 122.26(b)(14). The Stormwater Permit applies to *stormwater*, however, and does not authorize Defendants to discharge *non-stormwater* coal, coal dust, or coal slurry from SCLF

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17 *See* Mot. For JOP at 8 (citing to Ex. H (Letter from EPA to Seward Terminal, Inc., Feb. 9, 2001)).

18 The regulations implementing the CWA require NPDES permits for the discharge of stormwater from industrial facilities. 40 C.F.R. § 122.26. Under certain circumstances, an industrial discharger may receive authorization under a general permit for its stormwater discharges. 40 C.F.R. § 122.28.

19 MSGP for Stormwater Discharges Associated with Industrial Activity Factsheet.

point sources (including but not limited to the conveyor system, stockpiles, stacker/reclaimer, train unloader, rail cars, shiploader, bulldozers, and bobcats) into the Bay, wetlands or ponds. *See* Ex. 1 at 6-8; Ex. 16 at 18-19; *see also* Mot. for JOP at 9, n.22 (AES acknowledged that "EPA assigned the facility coverage under Sector AD of the [General Permit], which authorizes AES to *discharge stormwater* that has been managed through the implementation of a [Stormwater Plan].") (emphasis added).

The Stormwater General Permit is implemented at the facility through a Storm Water Pollution Prevention Plan ("SWPPP"). Ex. 4. The current Stormwater General Permit issued by EPA became effective on September 29, 2008.[20] *See* Ex. 1 at 1; *see also,* Mot. for JOP at 9, n.15. On May 15, 2009, AES submitted to EPA its notice of intent to discharge stormwater from the facility under the General Permit. *See* Mot. for JOP at 4, n.16 (referencing Exhibit J to Mot. for JOP (Doc. 40-18)). EPA acknowledged AES' intent to discharge stormwater under the Stormwater Permit on that same day, and authorized those stormwater discharges effective June 14, 2009. *See* Ex. 92.[21] EPA's authorization noted the requirement that AES develop and implement a SWPPP. *Id.* at 1. AES prepared the current SWPPP for the facility in May 2009, and substantively revised the plan on September 2, 2009, to address discharges from the conveyors, shiploaders, and sources of dust generation. Ex. 4 at 36 and 87. Accordingly, EPA did not consider either the original or revised SWPPP when granting authorization for the facility's stormwater discharges on May 15, 2009, via its acknowledgment of AES' notice of intent.

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[20] At the time EPA issued the Stormwater General Permit, it was responsible for implementing the NPDES program in Alaska. On October 31, 2009, the Alaska Department of Environmental Conservation received delegation from EPA under the CWA to implement stormwater permitting and enforcement. 73 Fed. Reg. 66243, 66244 (Nov. 7, 2008).

[21] Letter from EPA to Robert Brown, AES (May 15, 2009).

Importantly, the Stormwater Permit and the MSGP Fact Sheet note that only limited, specified categories of non-stormwater discharges are covered under the permit as exceptions to the general exclusion for discharges of non-stormwater. *See* Ex. 1 at 7-8. Those specified non-stormwater discharges include fire hydrant flushings and condensate from air conditioners, but nowhere on the list of exceptions to the general exclusion of discharges of non-stormwater is any reference, explicit or otherwise, to coal discharges from point sources. *See id.; see also* Ex. 16 at 19; Ex. 17[22] at 26 (non-stormwater discharges must be "specifically authorized by a separate, individual NPDES permit." (emphasis added)). As a result, AES's discharges of coal and its constituents are not covered by, or authorized under, any existing NPDES permit, including and especially the Stormwater Permit.

C. Discharges of Coal Into Waters of the U.S.

ACAT filed this action under the citizen suit provision of the CWA, alleging that Defendants have ongoing discharges of coal[23] from the SCLF into the Bay and other waters of the U.S. without authorization by an NPDES permit, as required under the Act. *See* Complaint (Doc. 1) at ¶¶ 48-75. Coal enters the Bay when it falls from the conveyor system and shiploader into the Bay in the process of being transferred to vessels, when it becomes airborne from points within the SCLF including the stockpiles, conveyor system, railcars, railcar dumper facility, stacker/reclaimer, bulldozers, and ship loader, and is discharged to the Bay, and when coal dust and the snow on which it settles and with which it is mixed are plowed with heavy machinery into the Bay or onto wetlands or ponds. The Defendants do not have a permit authorizing these ongoing discharges of coal into waters of the U.S.

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22 Developing Your Stormwater Pollution Prevention Plan, A Guide for Industrial Operators, U.S. EPA, Feb. 2009.

23 Coal, here, refers to coal and its constituents in all forms, including coal dust and coal slurry.

1. Coal Spillage into Resurrection Bay.

Coal spills from the BC14 conveyor, the ship loader (including the ship loader conveyors and chute) into Resurrection Bay. Photographs, testimony of Defendant employees and records, all attached as exhibits, document this coal spillage. Despite efforts by AES and ARRC to address these discharges, these discharges are continuing and reasonably likely to continue to occur.

a. Coal spills from the Ship Loader into Resurrection Bay.

In 2006, Defendant ARRC documented coal spillage from the ship loader. *See* Ex. 18 (notes regarding coal spillage post ship loading with photos documenting a pile of coal on the dock). In an AES 2009 Capital Expenditure report, Defendants noted that despite modifications to the ship loader chute, "there is still 25 tons or more of material to cleanup off the dock after every ship." *See* Ex. 19. In the Deposition of AES General Foreman Victor Stoltz, Mr. Stoltz acknowledged that coal continues to spill from the ship loader during the loading of ships. *See* Ex. 11, at 136:10-20 (noting in reference to the last ship load that there may be anywhere from 500 to 1,000 pounds of coal on the dock below the ship loader).

In addition to spilling onto the dock, coal spills onto the hold covers of the vessel. *See* Ex. 20[24], at 2-4 (photos attached to an email from Defendants in January 2011, documenting coal spillage on the hold covers of a vessel being loaded with coal); *see also* Ex. 11, Stoltz Depo. at 142:2-20, 143:13-23. Further, coal spills down from the ship loader directly into Resurrection Bay. *See* Ex. 11, Stoltz Depo. at 124:6-25, 125:1-5 (Mr. Stoltz acknowledged seeing coal fall from the ship loader into Resurrection Bay "possibly" in 2011, and more often prior to upgrades made in 2009); *see also* Ex. 14, Brown Depo. at 166:1-8.

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[24] E-mail from Daniel Ottenbreit to Victor Stoltz (Jan. 21, 2011).

b. Coal spills from the BC 14 conveyor into Resurrection Bay.

Coal is regularly wetted at the facility, either as a result of precipitation or in an effort to control coal dust. Wet coal sticks to the conveyor system. *See* Ex. 21 at 4 (noting that "[i]f there is too much water the mud sticks to the belt and becomes caked on to the return belt take up pullers and idlers."); Ex. 22 ("Coal fines sticking on the conveyor has always been an issue at the terminal here …."); Ex. 11, Stoltz Depo. at 11; Ex. 14, Brown Depo. at 164:9-14 (whether there is carryback depends on whether the coal is wet). This coal can remain caked on the return belt of the conveyor and is often referred to as "carryback." Ex. 11, Stoltz Depo. at (96:24-25, 97:1-5). Coal that remains stuck to the belt as the belt is returning is located on the under, downward-facing side of the belt. *Id*. at (97:4-5).

Carryback has been a recurring issue at the facility that AES has had to "constantly address[] in its best management practices." *Id*. at (97:15-16). An April 22, 2008, report by Martin Engineering, a company contracted to evaluate and identify sources of coal dust and spillage reported (1) "[s]ignificant dusting and spillage at [the BC 14] tail"; (2) "that "[c]arryback is very evident from coal build-up on structure over the water"; and (3) "[c]arryback and spillage" at the head of the BC 14 conveyor. *See* Ex. 23[25], at 16. Scrapers reduce carryback but do not eliminate all carryback. Ex. 11, Stoltz Depo. at 99:20-25.

In an effort to control this carryback under BC 14, AES has installed drip pans under the majority of the conveyor. Ex. 57 at 2 (installing drip pan under BC 14 to "catch the coal that falls off the belt and into the bay."); Ex. 11, Stoltz Depo. at 114:21-25, 115:1-2. These drip pans have not entirely eliminated discharges from the conveyor into Resurrection Bay.

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[25] Martin Engineering AES Environmental Upgrade Audit (April 22, 2008).

2. Coal Dust Discharged Into Resurrection Bay.

There are several sources of coal dust at the SCLF. An ARRC consultant identified that the "stacker reclaimer has been identified as a major (major is probably an accurate word here) source of dust emissions." Ex. 21 at 5; *see also* Ex. 9 at 13 (stacking and reclaiming coal "can have major airborne emissions"). ARRC responded to the consultant with a list of sources of dust emissions at the Facility, presented in the order of most to least dust generated, as: (1) stacking and reclaiming coal; (2) conveyor transfer points; and (3) the hopper building (railcar unloader) and the ship loader. Ex. 21 at 1. The same consultant also identified the railcar dumping facility "as a major source of dust emissions." Ex. 9 at 11; *see also* Ex. 22 ("the biggest source now seems to be the stacking and reclaiming operation"); Ex. 21 at 5 ("The unloading of coal from the rail cars into the 10 storage bins has been identified as a major … source of emissions."). Defendants acknowledge that dust is created at the ship loader when loading coal. *See* Ex. 93 at 1 (noting improvements that are expected to reduce dust at the ship loader).

The SCLF has been inspected by DEC on numerous occasions to evaluate how the SCLF is controlling dust and whether coal dust is leaving the SCLF property boundaries. *See* Ex. 24 (March 28, 2007 inspection report); Ex. 25 (Dec. 30, 2008 inspection report); Ex. 26 at AES (Feb. 19, 2010 inspection report). For example, in March of 2007, DEC inspectors witnessed "a large concentration of dust beyond the Terminal boundaries" coming from the stacker/reclaimer. Ex. 24 at 2. Wind speeds when this observation was made were approximately 18 knots (20.714 mph), gusting at 31 knots (35.674 mph), a wind speed not uncommon in Seward. *Id*.; *see also* Klafka Decl at ¶ 8. The DEC inspectors inspected the Seward Small Boat Harbor and found that "[m]any of the boats were coated with dust. The heaviest disposition (sic) was noted on boats on the outer side of the docks closest to Terminal and more directly in-line downwind of the Stacker/Reclaimer and the stockpiles." Ex. 24 at 2-3. A December 2008 DEC inspection report found that "the potential is still there for fugitive coal dust to leave the facility mainly through

wind dispersion. This dust can affect air quality, and settle to become mixed with stormwater and area water bodies thus affecting water quality." Ex. 24 at 3.

In March of 2007, HMH Consulting, Inc., contracted by the ARRC, conducted a composite and wipe analysis of dust samples throughout Seward. *See* Ex. 27.[26] The testing included taking eight samples at five sites. *Id*. at 2-4. Two of the sites, Site 4 and Site 5, were from boats docked at the Seward Boat Harbor. *Id*. at 3. Site 4 included samples from the boat docked at Slip F55, "Family Fun." *Id*. Site 5 included samples from the boat docked at Slip E66, "Emerald Fjord." The visual qualitative analysis of the samples estimated the percentage of black particles on the sample wipe. *Id*. at 7. Black particles were assumed to be coal. *Id*. The wipe analysis from "Family Fun" had 50% black particles, assumed to be coal. *Id*. at 8. The wipe analysis from "Emily Fjord" had 75% black particles, assumed to be coal. *Id*. at 9. The report concluded that "[m]ost of the carbon content of the wipe samples was determined to be coal particles." *Id.* at 5. An April 2007, email from HMH consulting to the ARRC confirmed the results of the 2007 report. Ex. 28[27] at 1. Numerous photos of the "Emerald Fjord" covered with dust were provided to DEC. S*ee* Ex. 29[28] (email from Carol Griswold regarding coal dust on the Emerald Fjord and photos of the Emerald Fjord covered with coal dust). In addition, Defendants took over a hundred photos of boats covered with what appears to be coal dust. *See* Ex. 30[29] at 7-53, 2-6, 54-136 (photos produced by ARRC of dust on boats in the Seward boat harbor).

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26 HMH Consulting, Inc., contracted by ARRC*, Air Quality Observations and Recommendations for the Seward Coal Loading Facility, Sample Collection of Airborne Deposits on Mar. 20, 2007.*

27 E-mail from Erik Haas to Al Bohn (Mar. 27, 2007).

28 E-mail from Carol Griswold to Michael Mitchell, Bob Morgan, and John Pavitt, with attached photos of the "Emerald Fjord" covered with dust (Feb. 28, 2007).

29 Photos produced by ARRC of dust on boats in Seward boat harbor.

Several boat owners complained of coal dust on their boats in March 2007. *See* Ex. 31[30] (March 2007 email from Phillips Cruises reported "a lot of coal dust on their vessel in Seward harbor"); Ex. 32[31] (March 2007 email from Aurora Charters that their "vessel is coated with coal dust."); Ex. 33[32] (March 2007 email to the ARRC that "the issue of coal dust on the boats in the harbor has been somewhat of an issue for years…. I think with this wind they have been getting more dust than usual on the boats."); Ex. 34[33] at 1-2 (March 2007 letter from Alaska Saltwater Charters noting that "the dust is especially bad in the winter when a ship is being loaded, a train is being unloaded, or the dust is blown off the stockpile…. The coal dust mixed by high north winds and salt spray has literally plastered the boats on the E dock as well as the rest of the Harbor."); Ex. 35[34] at 2 (notes from phone call from boat owners complaining of dust on their boats).

Defendant ARRC, responding to complaints of coal dust on boats, admitted that coal was going off-site and covering boats in the harbor (and therefore also falling into Resurrection Bay), noting that:

> the City of Seward (City) recently expanded the Small Boat Harbor so that it is now closer to the Facility. In so doing, the breakwater structure was moved closer to the coal loading dock. It is possible that this may have altered wind patterns within the boat harbor itself, causing winds to swirl around the harbor.

Ex. 36.[35] In an internal email regarding the coal dust covering boats in the harbor, an ARRC employee noted that:

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[30] E-mail from Steve Silverstein to Steve Hagedorn and Paul Farnsworth (Mar. 8, 2007).

[31] E-mail from Capt. Carl Hughes of Aurora Charters to Tim Thompson of Alaska Railroad Corp. ("AARC") (Mar. 9, 2007).

[32] E-mail from Vanta Shafer to Wendy Lindskoog (Mar. 15, 2007).

[33] E-mail from Dianne Dubuc of Alaska Saltwater Charters to AARC (Mar. 16, 2007).

[34] E-mail from Stephanie Wheeler to AARC employees, with notes from phone call with boat owners complaining of dust on their boats (Apr. 6, 2007).

[35] Letter from Stephanie Wheeler of AARC to Scott Ransom, Harbor Master for City of

> I'm afraid that at least some folks who are complaining in Seward are justified in their dismay, given the recent descriptions of the situation from two Railroaders. Apparently the loading of the ship over the past couple of days is resulting in significant coal dust clouds. Louis Bencardino, our Seward dock supervisor, said that he was barely able to see the coal facility buildings due to the thick dust clouds. Our Labor Relations person, Don Smith, was in Seward to check on his own boat, and he took photos and witnessed similar dust situations, describing the scene as 'aweful.' (sic) Bottom line: our own people are describing the situation as bad.

Ex. 37[36] at 1. The coal dust coming off the SCLF in March 2007 led to 25 complaints submitted to DEC with 75 pictures over a period of fourteen days from February 24, 2007, through April 3, 2007. Ex. 38[37] at 3.

In March 2008, Steve Denton, with Usibelli Coal Mine, Inc., the parent company of AES,[38] took samples of coal dust on two boats and a dock slip in the Seward Boat Harbor. Ex. 39.[39] The results found 74% coal on a Major Marine Boat[40], 34.8% coal on Star of the North, and 50% coal on Dock E47. *Id.* at 1-2. In November 2008, ARRC received a complaint from a boat owner that his boat "is still getting covered." Ex. 41.[41] In February 2009, Bartly Coiley, AES Manager of Environmental Affairs, noted that "[t]he boat owners have a legit complaint in my opinion." Ex. 42.[42] In February 2009, AES had a boat wipe sample analysis performed that

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Seward (Mar. 12, 2007).

36 E-mail from Mark Mitchell to Ernie Piper (Apr. 2, 2007).

37 Letter from DEC to Paul Farnsworth, Facility Program Manager, AARC (Apr. 13, 2007).

38 *See* AES Corporate Disclosure Statement, Doc. 24.

39 Coal swipe samples taken at Seward Coal Facility by Steve Denton of AARC (Mar. 19, 2008).

40 Interestingly, in an e-mail regarding dust on the Major Marine boat in February 2008, the Defendants were "adamant" that no dust went to the harbor. Ex. 40 at 1(E-mail from Steve Denton to Paul Farnsworth (Feb. 12, 2008)). However, given the coal swipe samples taken by Defendants (*see* Ex. 39), statements from Defendants that coal dust does not leave the facility must be seriously questioned, as the Major Marine boat sample was 75% coal dust.

41 E-mail from Mark Mitchell to Tim Thompson (Nov. 19, 2008).

42 E-mail from Bartly Coiley to Paul Farnsworth (Feb. 23, 2000).

found at least 95% coal dust on the boat dust wipe sample. Ex. 43.[43] Ten samples were taken and nine of the ten had results of 95% or more coal. *Id.*

In July 2009, the Raring Corporation, a company hired to provide dust control recommendations to Defendants, noted that while progress has been made in reducing dust since 2007, "coal dust continues to show up in the marina indicating that further work is needed." Ex. 22. In August 2009, ARRC received a complaint from a boat owner that coal dust from the SCLF had caused damage to his sailboat. Ex. 44.[44] In an ARRC meeting with boat owners in August 2009, boat owners expressed concerns about dust on their boats and that they saw dust coming off the ship loader in April 2009. Ex. 45[45] at 2. In August 2009, ARRC noted that their consultant, The Raring Corp., identified "that dust in the harbor is coming off the pile as the wind blows along the side of the pile." Ex. 46.[46]

In August 2008, Steve Denton noted that between unloading trains and loading vessels, "the wind still blows and we are not doing much to stop dust from blowing off the pile so the logic of that as a concern seems reasonable." Ex. 47[47] at 1.

On January 26, 2010, an ARRC employee reported that there was coal "dust on the edges of the docks"; "[t]he dust reached over to the passenger dock, I have not seen a lot of dust over there in previous episodes, but it was obvious this time"; "[t]here was dust on all sides of the facility except the northern edge. (It has been blowing to the south this whole episode)"; and that "[t]here was a lot of dust in the public parking area near the city boat launch." Ex. 48; *see also* Declaration of Russell Maddox in Support of Plaintiffs' Motion for Summary Judgment

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[43] E-mail from Lawrence Taylor to Erik Haas (Feb. 24, 2009).
[44] E-mail from Paul Rupple to Wendy Lindskoog (Aug. 9, 2009).
[45] E-mail from Bartly Coiley to Rob Brown (Aug. 12, 2009).
[46] E-mail from Paul Farnsworth to AARC employees (Aug. 14, 2009).
[47] E-mail from Steve Denton to Paul Farnsworth (Aug. 7, 2009).

("Maddox Decl.") at ¶¶ 11-12, 14-16 (Exs. 5 at 16-20, 6 at 4, 8 at 3-4, 9 at 6-8, and 10 at 14-16 all photographs taken the same day, January 26, 2010, by Mr. Maddox documenting coal dust on snow in the intertidal zone of Resurrection Bay as well as surrounding the SCLF).

In response to two Notices of Violation ("NOV") issued by DEC to Defendants for violating Alaska's Air Quality Control regulations for coal dust emissions from the SCLF, Defendants signed a Compliance Order by Consent ("COBC"). *See* Ex. 89. Among the actions required of Defendants under the COBC were to (1) follow Standard Operating Procedures ("SOPs") as set out in the COBC (Ex. 89 at 51 to 72) and (2) complete three supplemental environmental projects ("SEPs") at the SCLF (Ex. 89 at 14 and 74-76).[48] The SEPs included installation of spray bars, spray nozzles and sealing transfer points and adding foggers. *Id*. at 14. On December 23, 2010, AES reported back to DEC that they had completed the SEPs. *See* Ex. 96[49] at 2.

When SCLF cannot control coal dust, resulting in visible emissions, operators' last resort is to shut the facility down. *See* Ex. 89 at 55-56. It takes 20-30 minutes to shut down the SCLF. Ex. 8 at 1. Determinations as to whether the SCLF is controlling dust are based on visual observations, meaning that dust has already become airborne. *See* Ex. 89 at 54. Defendants acknowledge that not all coal dust is visible. Ex. 51[50] (noting that fine particles of coal dust "are invisible to the eye and … what we are finding on the boats in the small boat harbor" and that the smaller particles are "the particles you can't see that are travelling to the small boat harbor.")

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48 The COBC, SOP and SEP address DEC's NOVs for air emission violations, and do not address or reference any past or present Clean Water Act violations, such as those at issue in this case.

49 Letter from Rob Brown, AES, to Alice Edwards, Acting Division Director, DEC (Dec. 23, 2010).

50 E-mail from Bartly Coiley to Tom Brooks, Paul Farnsworth, and Rob Brown (July 28, 2009).

In April 2011, after the SOPs and SEPs were in place, AES was contacted by a boat owner about "persistent coal dust deposited on [his] boat." Ex. 49.[51] In correspondence with AES Manager Rob Brown, the boat owner noted that he has "had a boat in Seward for several years and [coal dust on his boat] has always been an issue. The dust is noticeable throughout the year, but it (sic) every winter it accumulates more heavily." Ex. 50.[52] Complaints regarding coal dust leaving the SCLF and being discharged into the Bay were filed as recently as January 29, 2012. *See* Ex. 85.[53]

3. Coal-contaminated Snow Discharged into Waters of the U.S.

Snow is removed from the dock over Resurrection Bay with a loader. *See* Ex. 14, Brown Depo. at 87:19-24. As discussed above, coal spills from the ship loader onto the dock and coal dust covers snow. Some snow falls through the cracks in the dock, discharged into the Bay (*see* Ex. 90, Deposition of Paul Farnsworth ("Farnsworth Depo.") at 113:3-114:6 (acknowledging that snow falls off the dock through slats into Resurrection Bay). A pond is located north of the coal stockpiles. *See* Ex. 3 and 4 at 41; *see* Ex. 90, Farnsworth Depo. at 32:22 to 33:6. Defendants store snow north of the coal stockpiles. *See* Ex. 11, Stoltz Depo. at 148:23 to 149:2. None of the coal discharges from the SCLF described above require the presence of runoff to occur, and these discharges regularly occur outside of precipitation or storm events.

V. ARGUMENT

Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits discharges of pollutants into waters of the United States, unless such discharges are authorized by an NPDES permit. 33 U.S.C. § 1342; *Waterkeepers of N. Cal. V. AG Indus. Mfg. Inc.*, 375 F.3d 913 (9th Cir. 2004). AES' discharges of stormwater are authorized by the Multi-Sector General Permit. *See* Ex 2.

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51 E-mail from Walter Heins to Andrew Behrend (Apr. 16, 2011).
52 E-mail from Walter Heins to Rob Brown (Apr. 19, 2011).
53 E-mail from Russ Maddox to Wallace Evans and John Pavitt (Jan. 29, 2012).

The discharges at issue in this case are not stormwater discharges, and are not otherwise authorized by AES' Stormwater Permit.

The unpermitted discharges at issue in this case include: (1) the ongoing non-stormwater discharges of coal, coal dust, coal slurry, coal-contaminated snow, and/or coal-contaminated water from the SCLF conveyor system (including the ship loader) into the Bay (Doc. 1 at ¶¶ 48-57); (2) the ongoing non-stormwater discharges of coal dust from the SCLF, including the stacker-reclaimer, coal stockpiles, railcar dumping facility, ship loader and the conveyor systems, into the Bay (Doc. 1 at ¶¶ 58-66); and (3) the ongoing non-stormwater discharges of coal, coal dust, coal slurry, coal-contaminated snow, and/or coal-contaminated water from the SCLF into wetlands, ponds, and/or the Bay when the facility operators either plow coal-contaminated snow directly into navigable waters or plow snow into or onto wetlands and/or ponds (navigable waters) (Doc. 1 at ¶¶ 67-75).

In Defendants' Motion for JOP, they specifically acknowledged that discharges of coal from the conveyor system have occurred. *See* Mot. for JOP (Doc. 40) at 6 ("flakes of 'carry-back' (congealed coal dust) were observed falling from the conveyor near the ship loaded, and from the ship loader itself, into the Bay."). While Defendants maintain that because they have a *Stormwater* Permit, they may discharge[54] coal into the Bay in any manner, whatsoever, even if it is a non-stormwater discharge, such discharges are not authorized under AES' Stormwater Permit. *See* Ex. 1 at 6-8.

These discharges are conveyed from point sources within the SCLF into Resurrection

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[54] In the Motion for JOP (Doc. 40), Defendants never stated the specific "discharge" that is covered by the Stormwater Permit and therefore shielded from liability. The Stormwater Permit covers stormwater discharges associated with the industrial activities at SCLF, which does not include non-stormwater discharges and direct discharges of coal to the Bay and surrounding waters of the U.S. *See* Ex. 1 at 6-8.

Bay and/or into wetlands, all of which are waters of the United States. Further, coal, coal dust, coal slurry, coal-contaminated snow, and/or coal-contaminated water are pollutants under the CWA.

Because these *non-stormwater* discharges from point sources are not authorized under the *Stormwater* Permit, Defendants are unlawfully discharging pollutants into waters of the U.S. without a permit in violation of 33 U.S.C. § 1311(a).

A. Coal is a Pollutant.

Coal is a pollutant under the CWA. The CWA defines "pollutant" as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6); *see also* 40 C.F.R. § 122.2. The legislative history clearly demonstrates that "pollutant" is to be broadly interpreted. *See* S. Rep. No. 92-414, at 76 (1972). Given the fact that even sand is defined as a pollutant under the CWA, there is no question that coal (whether in the form of coal chunks, coal flakes, coal paste, coal dust, coal slurry, coal-contaminated snow or coal-contaminated water) is considered a "pollutant" under the CWA.

B. Resurrection Bay is a "Water of the United States."

Resurrection Bay is a "water of the United States" under the CWA. The CWA defines "navigable waters" as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The EPA has further defined "the waters of the United States" to include "all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." 40 C.F.R. § 122.2. Because Resurrection Bay is navigable and clearly in use in interstate or foreign commerce – given the coal export activities at issue in this case – discharges into the Bay are under the jurisdiction of the CWA.

C. The ARRC Pond on the North End of the SCLF is a "Water of the United States."

The pond on Alaska Railroad land north of the stockpiles is a water of the United States, under the CWA. *See* Ex. 91[55] at 1-2 (noting that ARRC applied for a CWA Section 404 permit in 2005 from the U.S. Army Corps of Engineers to fill the pond north of the stockpile).

D. The Coal Stockpile, Stacker-Reclaimer, Railcar Unloader, Ship Loader, Bulldozers, Bobcats and Conveyor Systems Are Point Sources for Coal Discharges.

The coal stockpile, stacker-reclaimer, railcar unloader, ship loader, and conveyor systems are all point sources under the CWA. Under the CWA, "[t]he term 'point source' means any discernible, confined and discrete conveyance." 33 U.S.C. § 1362(14); *see also* 40 C.F.R. § 122.2. When determining whether a source is a point source or a non-point source, the Ninth Circuit looks to the traceability of the discharge to a single identifiable source. The Ninth Circuit has noted that "Congress ha[s] classified nonpoint source pollution as *runoff* caused primarily by rainfall around activities that employ or create pollutants. Such *runoff* could not be traced to any identifiable point of discharge." *Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1098 (9th Cir. 1998) (emphasis added) citing *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984); *see also United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) (reasoning that non-point sources of pollution "are virtually impossible to isolate to one polluter" and that "it contravenes the intent of [CWA] and the structure of the statute to exempt from regulation any activity that emits pollution from an identifiable point").

As the Ninth Circuit has also noted, "nonpoint source pollution … is widely understood to be the type of pollution that arises from many dispersed activities over large areas … not traceable to any single discrete source." *League of Wilderness Defenders v. Forsgren*, 309 F.3d

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55 *Expansion of Seward Loading Facility Stockpile Area FAQs*, AARC (Jan. 12, 2007).

1181, 1184 (9th Cir. 2002); *see also Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 219 (2d Cir. 2009) *citing* Frank P. Grad, *Treatise on Environmental Law* § 3.03 (updated 2009) ("Nonpoint sources include pollution from *diffuse land use activities* such as agriculture, construction and mining that enter the waters primarily through indiscrete and less identifiable natural processes such as runoffs, precipitation and percolation.") (emphasis added).

In determining if the pollutant comes from a point source, the Court must find that there is a "discernible, confined and discrete conveyance." *See* 33 U.S.C. § 1362(14). The "definition of a point source is to be broadly interpreted" and "embrac[es] the broadest possible definition of any identifiable conveyance from which pollutants might enter waters of the United States." *Cordiano*, 575 F.3d at 219. The focus of the analysis is whether one can identify where the pollutant comes from.[56]

Unlike non-point source pollutants that cannot be traced to any identifiable point, the coal, coal dust, coal slurry and coal-contaminated snow and water at issue in this case can all be traced to individual discrete sources at the SCLF. For example, coal dust can be traced to the coal stockpiles, the conveyor systems, the stacker/reclaimer, the ship loader and the railcar unloader. All of these facilities at the SCLF are consequently point sources.

While point source discharges of wind-transported pollutants may be less common, the requisite elements for establishing a point source are present and well-established. Discrete sources of the pollutants at the Facility are readily identifiable. *See e.g.* Ex. 21 at 5, Ex. 9 at 13, Ex. 21 at 1 and 5, Ex. 23 at 1. Coal dust is generated at the coal stockpiles, railcar unloader, stacker-reclaimer, ship loader, and the conveyor systems. *Id.* Each of these sites within the SCLF is an identifiable and discrete source of coal dust. Stockpiles, in particular, are common point

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[56] For coal falling from the BC 14 conveyor, the ship loader and/or a bobcat operating on the dock, there can be no question that these sources are point sources under the Act. *See, e.g., Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810, 815 (9th Cir. 2001) (bulldozers and backhoes constitute point sources).

sources under the Act. *See Consolidated Coal v. Costle*, 604 F.2d 239, 249 (4th Cir. 1979) (coal storage stockpiles were point sources because they were identifiable); *Sierra Club v. Abston Constr. Co., Inc.*, 620 F.2d 41, 46 (5th Cir. 1980) (coal piles were point sources because they were identifiable and the runoff that ran through the pile was conveyed via a ditch to waters of the U.S.); *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1009 (11th Cir. 2004) (identifying scrap metal piles as point sources); *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1359 (D.N.M. 1995) (holding that conveyances from mining overburden piles are point sources).

In addition, EPA's own guidance pertaining to point versus nonpoint source pollution specifically identifies "piles" as point sources:

> [Nonpoint source pollution] is caused by diffuse sources that are not regulated as point sources and normally associated with agricultural, silvicultural and urban runoff, runoff from construction activities, etc. Such pollution results in the human-made or human-induced alteration of the chemical, physical, biological, and radiological integrity of water. In practical terms, nonpoint source pollution does not result from a discharge at a specific, single location (such as a pile) but generally results from land runoff, precipitation, atmospheric deposition or percolation.

EPA Office of Water, *Nonpoint Source Guidance* 3, 5 (1987); *see also* Nonpoint Source Program and Grants Guidelines for States and Territories, 68 Fed. Reg. 60653, 60655 (Oct. 23, 2003) (emphasis added).

It is not relevant to this analysis that, in some instances, the pollutant travels through the air between the source and the receiving water. When determining whether a component at the SCLF is a point source, the question is not how coal is conveyed (for example via wind rather than an outfall pipe), but whether the source of the pollutant is discrete and identifiable. Consequently, whether or not the pollutant, in this case coal, becomes airborne between the source and the waters of the U.S. is wholly irrelevant. For example, in *Peconic Baykeeper, Inc. v. Suffolk County*, 600 F.3d 180 (2d Cir. 2010), the Court found helicopters and trucks to be point

sources regardless of the fact that the pollutants being discharged – pesticides – were conveyed through the air prior to landing in waters of the U.S.:

> Here, the spray apparatus was attached to trucks and helicopters, and was the source of the discharge. The pesticides were discharged "from" the source, and *not from the air*. The word "from" is defined "to indicate a starting point," and also denotes the "source or original or moving force of something . . . ." Webster's Third International Dictionary Unabridged 913 (2002). The district court's conclusion that the pesticides were not discharged from a point source was in error.

Id. at 188-189 (emphasis added).

In this case, the coal dust generated at several identifiable, discrete facilities at the SCLF is conveyed directly into Resurrection Bay. The fact that the coal dust becomes airborne and transported via wind before it settles into the water has no bearing on whether a component at the SCLF is a point source. *See id.; see also League of Wilderness Defenders*, 309 F.3d at 1185 (finding that regardless of the fact that pesticide applications would be subject to shifts from wind, the aircraft applying the pesticide was a point source because it was "spraying pesticide from mechanical sprayers directly over covered waters."); *No Spray Coalition v. City of New York*, 2005 WL 1354041, *5 (S.D.N.Y. June 8, 2005) (finding that the spraying of pollutants through the air and eventually into navigable waters from helicopters and trucks was an unlawful discharge of pollutants from a point source).

Defendants store and handle coal at discrete locations at the SCLF where it is then subject to transport by wind which deposits the coal dust directly into the Bay. Additionally, due to the process of how the coal is stored in the stockpiles, and how it is loaded and unloaded from the railcars, onto the conveyor, and onto vessels, Defendants generate coal dust that is blown, via the wind, directly over and into the Bay. Because coal dust is clearly and identifiably conveyed from these conveyances at the SCLF, they are all point sources under the CWA.

E. AES and ARRC Discharge or Add Coal to Waters of the U.S. from the SCLF.

1. Coal continues to fall from the ship loader into Resurrection Bay.

Defendants acknowledge that "[i]t is impossible to ensure that no coal falls in the bay when we are loading ships." *See* Ex. 52 at 1-2. For example, in February 2010, during a DEC inspection, inspectors observed carryback falling into Resurrection Bay from the conveyor near the ship loader (BC 14) and from the ship loader itself. *See* Ex. 26 at 4-5. Spilled coal was also "observed accumulating on the dock below the ship loader." *Id*. at 5. The dock was "coated with coal dust." *Id.* at 4. Photos attached to the report document loose coal on the dock below the ship loader (*id.* at 11, Image 28), coal on the catwalk near the ship loader (*id.*, Image 29), coal below the conveyor next to the ship loader (*id.*, Image 32), and coal dust on the deck of the vessel (*id.*, Image 33); *see also* Ex. 18 at 1 (notes regarding coal spillage post ship loading with photos documenting a pile of coal on the dock); Ex. 19 (noting that there is 25 tons or more of material to clean up off the dock after every ship).

Victor Stoltz, AES General Foreman, acknowledged that coal continues to spill from the ship loader during the loading of ships. *See* Ex. 11 at 136:10-20 (noting in reference to the most recent ship load that there may be anywhere from 500 to 1,000 pounds of coal on the dock below the ship loader) 132:18-22. Rob Brown, General Manager of AES, also acknowledged that coal spills onto the dock during ship loading. *See* Ex. 14, Brown Depo. at 164:1-3 (noting that he has seen carryback fall from the shiploader onto the dock); Brown Depo. at 163:14-23).

In addition to spilling onto the dock, coal spills onto the hold covers of the vessel being loaded. *See* Ex. 20 at 2-4 (photos attached to an email from Defendants in January, 2011, document coal spillage on the hold covers of a vessel being loaded with coal); *see also* Ex. 11, Stoltz Depo. at 142:2-20, 143:13-23. From spillage during loading, the photos document coal spilled over the hold covers on the vessel. *See id*. The coal is spilled to the edge of the covers. *Id*. For some vessels, the hold covers extend to the edge of the vessel, for others there may be only a

few feet between the edge of the covers and the edge of the ship. *See* Ex. 11, Stoltz Depo. at 142:1-19 (acknowledging coal spilled to the edge of the hold covers and that for some vessels, the covers run to the edge of the ship); *see also* 186:9-13 (Mr. Stoltz acknowledged that coal spilled off the ship loader conveyor and would spill over the cargo hold). These photos document that when vessels are loaded, coal is spilled onto the top of the vessel (the hold covers) and because coal is spilled to the edge of the covers, those covers run to the edge of the ship, and the ship loader extends over the Bay to the vessel, coal is also being spilled into Resurrection Bay.[57]

Further, coal spills down from the ship loader into Resurrection Bay. Mr. Brown, Mr. Stoltz and Mr. Farnsworth all acknowledge that coal spills from the ship loader into Resurrection Bay. *See* Ex. 11, Stoltz Depo. at 124:6-25, 125:1-5 (Mr. Stoltz acknowledged seeing coal fall from the ship loader into Resurrection Bay); *id*. at 132:21-24 ("There could have been some" coal spillage into Resurrection Bay); Ex. 14, Brown Depo. at 166:1-8 (acknowledging that when loading a ship, he has seen coal fall into Resurrection Bay); *Id*. at 165:18-21 (acknowledging that he has seen carryback fall from the ship loader into Resurrection Bay); *Id*. at 163:14-25 (acknowledging that carryback falls off the three shiploader conveyors and that there is a potential for the coal to fall into the Bay); Ex. 90, Farnsworth Depo. at 100:20-22 (acknowledging that coal spills from the ship loader into Resurrection Bay). Importantly, the ship loader conveyors have no drip pans to catch the carryback spillage. Ex. 14, Brown Depo. at 163:11-13; Ex. 11, Stoltz Depo. at 117:15-22.

Agency inspectors and AES staff have witnessed coal falling from the ship loader onto the dock and into Resurrection Bay. AES has no means to prevent this discharge. Consequently, every time a ship loads coal, coal falls into Resurrection Bay. Since 2005 through 2010, ships

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[57] The vessels are secured to dolphin moorings, with open water below the ship loader, between the vessel and the dock. Ex. 11, Stoltz Depo. at 144:3-10.

have been loaded on 315 days.[58] Defendants have no permit authorizing the discharge of coal from the ship loader or off the vessel or dock into Resurrection Bay. On these dates, 315 occasions, Defendants unlawfully discharged coal into Resurrection Bay.

2. Coal continues to spill from the BC 14 conveyor into Resurrection Bay.

Because the conveyor belt operates as a loop, and the return side of the BC 14 conveyor faces downward (Ex.11, Stoltz Depo. at 97:4-5), coal caked to the BC 14 conveyor falls from the return side into Resurrection Bay. The majority of the BC 14 conveyor extends directly above Resurrection Bay. *See* Exs. 3 and 4; *see also* Ex. 53[59] at 1 (BC 14 over open water). Historically, this coal has fallen freely and directly into Resurrection Bay. On October 30, 2009, the day following Plaintiffs' service of its Notice of Intent to sue under the Clean Water Act for unpermitted discharges of coal into Resurrection Bay, Defendants acknowledged the need to "resolve BC 14 carryback issues." *See* Ex. 54. In November 2009, Defendants acknowledged that improvements were necessary to ensure that "there is no carryback that can fall off into the water." *See* Ex. 55.

a. The nature of the conveyor system makes discharges inevitable, even after the recent installation of drip pans beneath a portion of the conveyor.

Coal carryback falls onto the beach (intertidal zone of Resurrection Bay)[60] and directly into Resurrection Bay from the BC 14 conveyor. *See* Maddox Decl at ¶¶ 21 and Maddox Ex. 15; Declaration of Bretwood Higman in Support of Plaintiffs' Motion for Summary Judgment ("Higman Decl.") (filed concurrently) at ¶¶ 3-4 and Higman Decl. Exs. 1-2; Declaration of Erin

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58 Ex. 95 identifies dates Defendants have loaded coal on ships from 2005 through 2010.

59 E-mail from Jacki Rose to Bartly Coiley (Apr. 3, 2009).

60 *See Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 749 (9th Cir. 1978) (finding that "[t]he term 'navigable waters' has been judicially defined to cover . . . waters within the ebb and flow of the tide.")

McKittrick in Support of Plaintiffs' Motion for Summary Judgment ("McKittrick Decl.") (filed concurrently) at ¶ 3 and McKittrick Decl. Exs. 1-3. Further evidence of carryback falling from the belt can be found by examining the framework supporting the BC 14 conveyor and the beach below the conveyor. *See* Maddox Decl. at ¶¶ 21-25 and Maddox Decl. Exs. 15-18; Ex. 23 at 1and 16 (engineering report identifying carryback on BC14 conveyor framework); Ex. 26 at 4 ("[s]pilled coal was observed accumulating on … structural components under the belt conveyor next to the dock.") and 10-11 (photos attached to the report document coal on framework below the conveyor (Image 26)), coal on the catwalk near the ship loader (Image 29), coal below the conveyor next to the ship loader (Image 32)).

In the February 2010 DEC inspection, DEC inspectors observed carryback falling into Resurrection Bay from the conveyor near the ship loader (BC 14). *See* Ex. 26 at 4-5. Photos attached to the report also document coal on the framework below the conveyor (*id.* at 10 (Image 26)).

In order to prevent carryback coal from falling into Resurrection Bay, Defendants installed drip pans beneath the BC 14 conveyor in July 2011. *See* Ex. 56[61] at 1; *see also* Ex.57[62] at 2 (installing drip pan under BC 14 to "catch the coal that falls off the belt and into the bay."); Ex. 11, Stoltz Depo. at 114:21-25, 115:1-2. Prior to installation of the drip pans, AES acknowledged that carryback would fall from the belt into the Bay. *See* Ex. 11, Stoltz Depo. at 104:1-5 (acknowledging that prior to installation of the drip pan carryback coal would fall in the Bay); *id.* at 115:7-25, 116:1-3 (acknowledging that he was aware that there were discharges of coal from the return belt of BC 14 into the Bay); *see also id*. at 106:24-25, 107:1-11

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61 E-mails between B. Coiley, R. Brown, J.Rose and B.Hoefler RE: Seward SWPPP conveyor controls (April 3-7, 2009).

62 *Weather is the Railroad's Greatest Challenge*, Heidi Zemach, Seward City News (Feb. 4, 2011).

(acknowledging seeing coal on the beach below the conveyor). Defendants also acknowledged that coal falling from the return side of the conveyor belt has been caked on the BC 14 conveyor framework, directly above open water. *See* Ex. 56 at 1; *see* Ex. 11, Stoltz Depo. at 104:25, 105:1-8.

While drip pans may catch some of the carryback coal falling from the conveyor, they must be operated and maintained properly to prevent that coal from reaching Resurrection Bay. When not operated or maintained properly, these drip pans become filled above the edge of the pan and then spill coal into Resurrection Bay. *See* Ex. 58[63] at 4-5, 7-10 (photos showing coal in drip pans above the edge of the drip pan); Ex. 59[64] at 5 and Ex. 60 at 2 and 3(photos with coal carryback on the outside edge of the drip pans and/or the framework indicating that coal is spilling outside of the drip pan); *see also* Ex. 11, Stoltz Depo. at 168:8-10 (referring to Ex. 58 at 5) (acknowledging that carryback coal is above the drip pan edge); 169:16-20 (referring to Ex. 58 at7) (acknowledging that carryback coal is above the drip pan edge), 170:9-11 (acknowledging that coal can pile above the drip pan edge); Ex. 14, Brown Depo. at 217:8-10 (referring to Ex. 58 at 4) (acknowledging that carryback coal is above the drip pan edge), 218:11-14 (referring to Ex. 58 at 5) (acknowledging that carryback coal is above the drip pan edge), 219:17-19 (acknowledging that he has seen carryback above the drip pan edge), 222:6-25 and 223:1-6 (acknowledging that when the drip pan is filled with carryback coal above the drip pan edge it is possible for the carryback coal to fall into Resurrection Bay). Mr. Brown acknowledges that he is uncertain whether the drip pans have eliminated all carryback from falling off the belt into Resurrection Bay. Ex. 14, Brown Depo.at 236:4-7. In addition, coal spillage can splatter off the pan into the Bay or hit the edge of the pan and spill into the Bay, regardless of whether the pan is filled with carryback to the drip pan edge. *See* Ex. 59 at 5 (showing coal carryback splatter

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63 E-mail from Aurora Energy Services to Rob Brown (Jan. 20, 2012).

64 E-mail from Victor Stoltz to Paul Farnsworth and Rob Brown (Nov. 17, 2011).

along the outside edge of the drip pan); Ex. 60[65] at 2 and 3 (photos with coal carryback on the outside edge of the drip pans and/or on the framework indicating that coal is spilling outside of the drip pan).

Further, there are no procedures in place to ensure that proper operation and maintenance of the drip pans occurs such that the pans will prevent all discharges of coal to the Bay. AES General Manager Rob Brown acknowledged that AES has not developed any specifications for how often the drip pans should be cleaned out (Ex. 14, Brown Depo. at 230:25 to 231:3), has not developed any specifications for the methods to be used when cleaning out the drip pans (*id*. at 231:4-7), has not developed a manual for operating the drip pans (*id*. at 231:12-13), and has not determined how much coal the pans can hold before releasing material into the Bay (*id*. at 232:17 to 233:2).

In addition to coal spilling over the drip pan edge and falling into Resurrection Bay, there is ongoing coal spillage where there are no drip pans. First, there is no drip pan under BC 14 at the BC 14 transfer tower. Ex. 11, Stoltz Depo. at 116:13-20. Second, there are no drip pans for the ship loader conveyors. *Id*. at 117:10-22. Consequently, while drip pans may have reduced the amount of coal spilling from the BC 14 conveyor into the Bay, they have not completely eliminated all discharges, making the discharges ongoing. Furthermore, months after the drip pans were installed, carryback was documented below the conveyor in the intertidal zone. *See* Maddox Decl. at ¶ 21 and Maddox Decl. Ex. 15 at 52 to 54 (discharge of carryback coal into Resurrection Bay on January 12, 2012). Additional photographs taken on January 29, 2012 of a stripe of coal dust on white snow below the conveyor taken on January 29, 2012, indicate that the drip pans have not eliminated the discharge of carryback coal from the BC 14 conveyor into Resurrection Bay. *See* Maddox Decl. at ¶ 21 and Maddox Decl. Ex. 15 at 55-58.

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65 E-mail from Victor Stoltz to Rob Brown (Sept. 22, 2011).

b. Discharges of coal from the conveyor have been documented on specific days.

DEC inspection reports also have documented coal falling into Resurrection Bay. *See* Ex. 26 at 4 (DEC inspectors visited the SCLF on Feb. 2, 2010, before the installation of drip pans, and witnessed coal falling into the Bay). On this date, Defendants unlawfully discharged coal into Resurrection Bay.

Carryback coal was observed falling into Resurrection Bay by Mr. Maddox , Mr. Higman and Ms. McKittrick on August 8, 2009. *See* Maddox Decl. at ¶¶ 21 and 23 and Maddox Decl. Ex. 15 at 1-7 and 59-62; Higman Decl. at ¶¶ 3-4; McKittrick Decl. at ¶ 3. Video of coal falling into Resurrection Bay was taken by Mr. Higman on August 8, 2009. *See* Higman Decl. at ¶¶ 3-4 and Higman Decl. Ex. 4 (video documenting coal falling from conveyor onto Tyvek tarp sheet under conveyor, onto beach in intertidal zone and directly into Resurrection Bay during the loading of a vessel) and Ex. 5 to Higman Decl. (video of coal falling into Resurrection Bay and onto Tyvek tarp on beach under conveyor). On this date, Defendants unlawfully discharged coal into Resurrection Bay.

Carryback coal spillage has been seen directly below the BC 14 conveyor, on the beach within the intertidal zone on October 11, 2009, October 12, 2009, October 13, 2009, February 6, 2010, April 25, 2010, April 26, 2010, May 31, 2010, December 23, 2010, January 20, 2012 and January 31, 2012. *See* Maddox Decl. at ¶ 21 and Maddox Ex. 15. Because the discharges onto the beach are within the intertidal zone, they are discharges into Resurrection Bay. *See Leslie Salt Co.*, 578 F.2d at 749. On these dates, on ten occasions, Defendants unlawfully discharged coal into Resurrection Bay.

Carryback coal spillage has been seen falling from the BC 14 conveyor directly into Resurrection Bay on June 27, 2008, October 11, 2009,[66] and October 19, 2008. *See* Maddox

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66 This date was previously counted as a violation.

Decl. at ¶ 24 and Maddox Ex. 18 at 1, 17 to 21. On these dates, on two occasions, Defendants unlawfully discharged coal into Resurrection Bay.

Because carryback falls from the BC 14 conveyor and there were no drip pans prior to the summer of 2011, each day the BC 14 conveyor was operating from 2005 through the end of 2010 (loading coal onto vessels), carryback coal was unlawfully discharged into Resurrection Bay. *See* Ex. 95 (includes 315 days when ships were docked for loading from 2005 through 2010, and these violations were noted in Section IV.E.1. above).

3. Coal dust from point sources within the SCLF is discharged to Resurrection Bay.

Several point sources within the SCLF generate coal dust, including the stacker/reclaimer, the railcar unloader, the coal stockpiles, the conveyor system and the ship loader. *See infra* Section IV.C.2. When these point sources create coal dust, and wind blows from the north, coal dust may be deposited in Resurrection Bay. *See* Klafka Decl. at ¶¶ 11-12, 18-20; *see also* Maddox Decl at ¶ 32 and Maddox Decl. Ex. 24 (Jan. 29, 2012 video taken by Mr. Maddox documenting coal dust on snow downwind of the SCLF with white snow to the north and snow covered with dust to the south).

a. Coal dust generated at the SCLF has left, and continues to leave, the SCLF and to reach Resurrection Bay.

As discussed above in Section IV.C.2, coal dust is generated from several point sources at the SCLF and is discharged into Resurrection Bay. The stacker/reclaimer, the railcar unloader, conveyor transfer points and ship loader are all major sources of coal dust. *See* Ex. 21 at 1 and 5, Ex. 9 at 13, and Ex. 22. In 2007 and 2008, significant dust emissions led to the issuance of NOVs by DEC. *See* Ex. 89 at 7-8. Since 2008, Defendants have made improvements to the SCLF, but coal dust is still generated and discharged into Resurrection Bay.

Steven Klafka, an environmental engineer who has worked in the field of air pollution control since 1981, has reviewed the SCLF operations and noted that coal handling operations

create dust and that there is a reasonable likelihood that coal dust from the SCLF will continue to become airborne and deposited in Resurrection Bay. *See* Klafka Decl. at ¶¶ 1-5, 11-12, and 18-20.

Such ongoing discharges of coal dust into the Bay is evidenced by coal dust routinely covering boats in the Seward Small Boat Harbor, just south of the SCLF. *See* Ex. 3. Boats in the harbor have been sampled numerous times by contractors hired by Defendants and each time, the samples confirmed that the dust on those boats was mainly coal dust, demonstrating that coal dust is discharged into Resurrection Bay. *See* Ex. 27; Ex. 39; Ex. 43. It would defy common sense and the laws of physics for these boats to be covered in coal dust and not have coal dust being discharged into the harbor around the boats as well, given the fact that there is open water between the boats in the harbor slips and the SCLF, and there is open water between and around the boats. *See* Ex. 3. DEC has inspected the SCLF numerous times, recording that dust is leaving the facility boundaries and confirming the presence of coal dust on boats. *See* Ex. 24 (March 28, 2007 inspection report); Ex. 25 (Dec. 30, 2008 inspection report); Ex. 26 (Feb. 19, 2010 inspection report). Consultants hired by Defendants to provide dust control recommendations have confirmed that coal dust reaches Resurrection Bay. *See* Exs. 22 and 46.

b. Discharges of coal dust from the SCLF have been documented on specific days.

When coal dust is created at the ship loader, and it goes off site, it goes into Resurrection Bay, as the vessel is surrounded by waters of the U.S. AES acknowledges that coal dust from the shiploader is discharged into the Bay. *See* Ex. 11, Stoltz Depo. at 96:11-21; *see also* AES Answer (Doc. 15) at ¶ 41 (admitting that coal dust from the SCLF may have been deposited in Resurrection Bay).

Instances when coal dust goes "off site," as recorded by AES, during ship loading are also clear cases where coal dust has been discharged from a point source (the ship loader) into

waters of the U.S. For example, on the following dates in late-December 2010 to January 2011, AES recorded visual observations that coal dust did not stay on-site during ship loading: December 20, 2010 (Ex. 61[67] at 1); December 21, 2010 (Ex. 61 at 2); December 22, 2010 (Ex. 61 at 3); December 23, 2010[68] (Ex. 61 at 4); December 27, 2010 (Ex. 61 at 5); December 28, 2012 (Ex. 61 at 6-7); and January 22, 2011 (Ex. 61 at 8).[69] On these dates, six occasions, Defendants unlawfully discharged coal into Resurrection Bay.

In addition, AES has recorded shut-down dates where ship loading was stopped due to the inability to control dust. Some examples of shut-downs include: January 29, 2008 (Exs. 63[70] and 64[71]); January 30, 2008 (*Id.*); June 16, 2008 (ship loading ceased and workers reported dust as shoveling coal from the ship loader onto the dock below) (Ex. 65[72]); and January 23, 2010 (Ex. 66[73]). Because shut-down occurs after airborne dust has been observed, such shut-downs are not capable of preventing discharges of the already airborne dust into Resurrection Bay. On these dates, four occasions, Defendants unlawfully discharged coal into Resurrection Bay.

On certain dates, unloading of trains was also halted due to wind blowing coal dust off-site. For example, on January 12, 2008, dust was recorded blowing towards town. Ex. 67.[74] Because town is south of the Facility, and town is further than Resurrection Bay in terms of linear distance, coal dust on that date was discharged into Resurrection Bay. On April 12, 2008,

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67 AES Visual Determination of Dust Emissions reports (Dec. 2010-Jan. 2011).

68 This date was previously counted as a violation.

69 In addition, records indicated dust also went off site during train loading during this period. *See* Ex. 62 (AES Visual Determination of Dust Emissions reports (Dec. 19-21, 2010 and Dec. 28, 2010).

70 AES Dust Control Measures Used During Unloading & Loading 2008 & 2009.

71 AES Ship Loading Notes Since October 2007.

72 AES Dust Notes (June 16, July 8, and July 11, 2008).

73 AES Dust Notes (Jan. 23, 2010).

74 AES Train Unloading Report (Jan. 12, 2008).

dust blew off the stockpile from the stacker/reclaimer and was "blowing into pond." Ex. 68.[75] The pond, located at the north end of the SCLF is also a water of the United States. *See* Ex. 69[76] at 1, 4-5 (identifies need for CWA Section 404 permit for fill of large pond on north end of SCLF); Ex. 70[77] (ARRC letter referring to U.S. Army Corps of Engineers Section 404 permit for SCLF expansion and fill of north pond). On these dates, two occasions, Defendants unlawfully discharged coal into Resurrection Bay.

DEC received complaints on February 24, 2007, February 26, 2007, February 28, 2007, March 3, 2007, March 6, 2007, March 11, 2007, March 20, 2007, March 23, 2007, March 28, 2007, April 2, 2007, and April 3, 2007. Ex. 71[78] at 1. Over these eleven days, DEC received 25 public complaints and 75 photographs. *Id*. DEC issued a NOV under the Clean Air Act for Defendants' inability to control the coal dust. Ex. 72[79] at 3. Several of the 25 complaints referenced in the NOV (Ex. 72 at 3) included reports of coal dust on boats in the Seward boat harbor. *See* Ex. 31 (March 2007 email that Phillips Cruises reported "a lot of coal dust on their vessel in Seward harbor"); Ex. 32 (March 2007 email from Aurora Charters that their "vessel is coated with coal dust."); Ex. 33 at 1 (March 2007 email to the ARRC that "the issue of coal dust on the boats in the harbor has been somewhat of an issue for years…. I think with this wind they have been getting more dust than usual on the boats."); Ex. 34 (March 2007 letter from Alaska Saltwater Charters noting that "the dust is especially bad in the winter when a ship is being loaded, a train is being unloaded, or the dust is blown off the stockpile…. The coal dust mixed

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75 AES Visual Determination of Dust Emissions report (Apr. 12, 2008).

76 E-mail from Sasha Forland to Paul Farnsworth (Dec. 1, 2005).

77 Letter from Barbara Hotchkin, Permits and NEPA Specialist, ARRC to Jim Renkert, Alaska DNR (September 2005).

78 Seward Coal Terminal Air Quality Complaints, February-March 2007.

79 Letter, Notice of Violation, from Cynthia Espinoza, DEC Enforcement Officer, to Paul Fransworth of AARC (Apr. 13, 2007).

by high north winds and salt spray has literally plastered the boats on the E dock as well as the rest of the Harbor."); Ex. 35 at 2 (notes from phone call from boat owners complaining of dust on their boat). During this period of February 24, 2007 through April 3, 2007, Defendant ARRC acknowledged that coal dust was covering boats in the harbor (and thus also falling in Resurrection Bay). Ex. 36. For the days these complaints were filed, eleven occasions, Defendants unlawfully discharged coal dust into Resurrection Bay.

In February 2008, DEC received two complaints regarding coal dust leaving the SCLF on February 8, 2008. Ex. 73[80] at 2. DEC issued a second NOV to Defendants for Defendants' inability to control the coal dust on February 8, 2008. *Id*. In March of 2008, Defendants took dust samples from boats in the boat harbor, confirming that they were covered by coal dust. Ex. 39 at 1. On this date, one occasion, Defendants unlawfully discharged coal into Resurrection Bay.

On January 26, 2010, ARRC employees confirmed that there was coal "dust on the edges of the docks"; "[t]he dust reached over to the passenger dock, I have not seen a lot of dust over there in previous episodes, but it was obvious this time"; "[t]here was dust on all sides of the facility except the northern edge. (It has been blowing to the south this whole episode)"; and that "[t]here was a lot of dust in the public parking area near the city boat launch." Ex. 48. On this date, one occasion, Defendants unlawfully discharged coal into Resurrection Bay.

On November 21, 2010, Russ Maddox complained to DEC about coal dust "blowing from the facility over the harbor and community over the past three days." Ex. 74[81], Maddox Decl. at ¶ 28. On those dates (November 19-21, 2010), three occasion, Defendants unlawfully discharged coal into Resurrection Bay.

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80 Letter, Notice of Violation, from Debra Dalcher, DEC Enforcement Officer, to Paul Farnsworth of AARC (Mar. 17, 2008).

81 E-mail from Russ Maddox to Wallace Evans and John Pavitt (Nov. 21, 2010).

In December 2010, AES shut down several times due to dust. *See e.g.* Ex. 75[82] (stop loading due to high winds causing dust control parameters to be exceeded on December 21, 2010, December 22, 2010); Ex. 76[83] (stop loading due to high winds causing dust control parameters to be exceeded on December 23, 2010); Ex. 77[84] (Rob Brown noting that they had been unable to dump trains for about 10 days due to the dusty coal and high winds and that he had to respond to prepare three reports for DEC due to citizen complaints); Ex. 78[85] (noting that they had to shut down on December 22, 2010 because "dust went quite a ways in the air."); Ex. 79 (had to shut down on December 22, 2010 because the "dust was uncontrollable."). On December 22, 2010, Steve Denton referred to the situation as "quite severe." Ex. 80 at 1. Gusts were measured at 55 mph and Mr. Denton noted that

> *[u]nder these conditions it is impossible to control fugitive dust* in compliance with our operating requirements….This condition has been prevalent for most of the last 24 hours forcing suspension of loading yesterday afternoon. An attempt was made to resume mid-day today and the terminal was forced to shut down almost immediately.

Id. (emphasis added). On December 18, 2010, Russ Maddox submitted a complaint to DEC regarding coal dust coming from the SCLF and covering areas south and downwind of the SCLF with coal dust. *See* Ex. 81; *see also* Maddox Decl. at ¶ 29 and Maddox Decl. Ex. 1 at 23-25. On the following days, Mr. Maddox took photographs of coal dust on snow at the SCLF, downwind of the facility, feet away from Resurrection Bay and at the shoreline in the intertidal zone: December 19, 2010 (Maddox Decl. at ¶ 12 and Maddox Decl. Ex. 6 at 13-22), December 21, 2010 (Maddox Decl. at ¶¶ 12 and 19 and Maddox Decl. Ex. 6 at 23-32, Ex. 13 at 3-4), December 22, 2010 (Maddox Decl. at ¶¶ 11-12 and Maddox Decl. Ex. 5 at 34-35, Ex. 6 at 33-40),

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82 E-mail from Greg LeBeau to Rob Brown, et al. (Dec. 22, 2010).
83 E-mail from George LeBeau to AARC (Rob Brown, et al.) (Dec. 23, 2010).
84 E-mail from Rob Brown to Steve Denton, et al. (Dec. 22, 2010).
85 E-mail from Rob Brown to Steve Denton (Dec. 22, 2010).

December 23, 2010 (Maddox Decl. at ¶¶ 11-12 and 19 and Maddox Decl. Ex. 5 at 36-38, Ex. 6 at 41-44, Ex. 13 at 3-4), December 24, 2010 (Maddox Decl. at ¶¶ 11-12 and Maddox Decl. Ex. 5 at 39-45, Ex. 6 at 45-48), and December 27, 2010 (Maddox Decl. at ¶ 12 and Maddox Decl. Ex. 5 at 46). In addition to the unlawful discharge dates identified above,[86] Defendants unlawfully discharged coal into Resurrection Bay on three occasions, December 18, 2010, December 19, 2010, and December 24, 2010.

Defendants finalized implementation of the SOPs and SEPs at the SCLF on December 23, 2010 (*see* Ex. 96 at 2), but coal dust discharges to Resurrection Bay have continued.

On November 21, 2011, Russ Maddox received three reports of coal dust clouds passing over the harbor and town. *See* Ex. 83[87]; *see also* Maddox Decl. at ¶ 28. While AES shut down, the cloud still dispersed beyond the SCLF and above the harbor, discharging into Resurrection Bay on this date. *See* Ex. 84[88] at 1; *see also* Ex. 97 (AES complaint form and reports of coal dust going off site at the ship loader and stacker reclaimer).

On January 22, 2012,[89] Russ Maddox sent a complaint to DEC for coal dust that had left the SCLF. *See* Ex. 82[90]; Maddox Decl. at ¶ 30. Photos taken by Mr. Maddox on January 21, 2012 documented coal dust on snow within the intertidal zone along Resurrection Bay just south of the SCLF. Maddox Decl. at ¶ 30 and Maddox Decl. Ex. 22 at 1-4 and 6-7. In addition, photos taken by Mr. Maddox also document coal on snow submerged under the water. *See* Maddox

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86 *See infra* at pp. 21, 35, 38, 40-44 for further evidence of discharges on December 20-23, 2010, December 27-28, 2010, and January 22, 2011.

87 E-mail from Russ Maddox to Wallace Evans (Nov. 22, 2011).

88 E-mail from Wallace Evans to Russ Maddox (Nov. 23, 2011).

89 On December 23, 2010, Defendants completed all improvements to the SCLF in response to the NOVs issued by DEC. *See* Ex. 89.

90 E-mail from Paul Farnsworth to Victor Stoltz (Dec. 20, 2010).

Decl. Ex. 22 at 6-7. Because this coal-covered snow is in the intertidal zone and below the water, Defendants unlawfully discharged coal into Resurrection Bay on January 21, 2012.

On January 29, 2012, Russ Maddox sent a complaint to DEC about coal dust leaving the SCLF. Ex. 85[91]; *see also* Maddox Decl. at ¶ 31. Photos taken by Mr. Maddox on January 28, 2012, document coal dust covering the snow just feet from the harbor and in the Seward recycling shed at the southern end of the Seward ship harbor parking lot, also only feet from the shoreline. Maddox Decl. at ¶ 31and Maddox Decl. Ex. 23. While AES shut down the SCLF due to its inability to control coal dust and prevent coal dust from leaving the premises[92] (*see* Ex. at 2), coal dust was discharged into Resurrection Bay on this date.

On March 5, 2008, January 26, 2010, January 27, 2010, January 28, 2010, January 31, 2010, December 19, 2010, December 21, 2010, December 22, 2010, December 24, 2010, and February 1, 2011, Mr. Maddox documented coal dust on snow in the intertidal zone of Resurrection Bay. *See* Maddox Decl. at ¶12 and Maddox Decl. Ex. 6. As recent as February 6, 2012, Mr. Maddox has documented coal dust on snow in the intertidal zone of Resurrection Bay. *See* Maddox Decl. at ¶12 and Maddox Decl. Ex. 6 at 49-50. On these dates, six occasions,[93] Defendants unlawfully discharged coal into Resurrection Bay.

Mr. Maddox and other citizens have also observed dust clouds from the ship loader extending beyond the limits of the vessel, and therefore falling into Resurrection Bay. *See* Ex. 86 (cloud of dust from ship loader observed April 2, 2007); Maddox Decl. at ¶¶ 10 and 27 and Maddox Decl. Ex. 4 at 1-11 (photographs documenting dust from ship loader being discharged

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91 E-mail from Russ Maddox to Wallace Evans and John Pavitt (Jan. 29, 2012).

92 In addition, coal dust continues to be discharged into Resurrection Bay despite the coal dust improvements made through the SEPs. While the measures added to the SCLF may have reduced the amount of coal dust being discharged into Resurrection Bay, the discharges continue to occur regularly to this day.

93 *See infra* pp. 20-21, 38, 40-42 for further evidence of discharges on January 26, 2010, December 19, 2010, December 21, 2010, December 22, 2010, and December 24, 2010.

into Resurrection Bay on January 23, 2010, and February 6, 2010) and Ex. 21 at 1-6 (photographs documenting dust from ship loader being discharged into Resurrection Bay on March 31, 2007, April 2, 2007, and December 22, 2009). On these dates, two occasions,[94] Defendants unlawfully discharged coal into Resurrection Bay.

In addition to all the dates identified above on which Defendants unlawfully discharged coal into Resurrection Bay, Mr. Maddox observed coal dust blow into Resurrection Bay or saw snow covered with coal dust in the intertidal zone on February 27, 2007 (Maddox Decl. at ¶ 7), January 7, 2009 (Maddox Decl. at ¶ 7), January 29, 2010 (Maddox Decl. at ¶¶ 13, 16), February 1, 2010 (Maddox Decl. at ¶ 16), February 4, 2010 (Maddox Decl. at ¶¶ 15-16), February 1, 2011 (Maddox Decl. at ¶ 12), November 21, 2011 (Maddox Decl. at ¶ 28), February 9, 2012 (Maddox Decl. at ¶ 18), February 16, 2012 (*id*.), and February 19, 20120 (*id*.). On these dates, ten occasions, Defendants unlawfully discharged coal into Resurrection Bay.

4. Coal-contaminated snow removed from the dock enters Resurrection Bay and coal-contaminated snow plowed onto ponds or wetlands enter waters of the U.S.

Citizens have witnessed AES plowing[95] contaminated snow directly into the Bay. *See*

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94 *See infra* pp. 35, 38-39 and 43 for further evidence of discharges on April 2, 2007, January 23, 2010, and February 6, 2010.

95 Plow trucks are point sources under the Act. *See, e.g., Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810, 815 (9th Cir. 2001) ("The statutory definition of 'point source' . . . is extremely broad, and courts have found that 'bulldozers and backhoes' can constitute 'point sources.' . . . In this case, bulldozers and tractors were used to pull large metal prongs through the soil. We can think of no reason why this combination would not satisfy the definition of a "point source."); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir.1983) (bulldozers and backhoes constitute point sources under the CWA); *United States v. Tull*, 615 F. Supp. 610, 622 (E.D. Va.1983) (identifying bulldozers and dump trucks as point sources), *aff'd,* 769 F.2d 182 (4th Cir. 1985), *rev'd on other grounds*, 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987); *United States v. Weisman*, 489 F. Supp. 1331, 1337 (M.D. Fla.1980) (identifying bulldozers and dump trucks as point sources); *Colvin v. U.S.*, 181 F.Supp.2d 1050, 1056 (E.D. Cal. 2001). ("[I]t is well established that bulldozers and similar

Maddox Decl. at ¶ 33. Such discharges of coal into the Bay are not covered by Defendants' Stormwater Permit. *See* 40 C.F.R. § 122.26(b)(13) ("Storm water means storm water runoff, *snow melt runoff*, and surface runoff and drainage") (emphasis added). Region 10 of the U.S. EPA considers snow dumping into waters of the U.S. a point source discharge. *See* Ex. 87[96] at 26 (noting that EPA Region 10 considers snow dumping a point source); *see also id.* at 9 (snow can collect pollutants which can accumulate where the snow is dumped), and 21 (noting that "[d]ebris collected with snow would count as 'residue'"); *see also* Ex. 88 (Region 1 EPA Draft Snow Dumping Policy).

Defendants remove coal-contaminated snow from the dock over Resurrection Bay. *See* Ex. 14, Brown Depo. at 87:19-24. As discussed above, coal from the Facility is deposited on the dock via spillage from the conveyor and ship loader, and via coal dust deposition. When there is snow on the dock, that coal spillage and coal dust accumulates on the snow. During snow removal, snow, coated with coal dust and coal spillage, is either intentionally or unintentionally discharged from the dock into Resurrection Bay. Some snow falls through the cracks in the dock and is discharged into the Bay (*see* Ex. 90, Farnsworth Depo. at 113:3-114:6 (acknowledging that snow falls off the dock through slats into Resurrection Bay)), and some snow is discharged over the edge of the dock as the loader removes snow.

Defendants also plow coal-contaminated snow directly onto a pond and adjacent wetlands north of the coal stockpiles. *See* Maddox Decl. at ¶ 26 and Maddox Decl. Ex. 20. The

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vehicles may be 'point sources' under the CWA when they are, as here, utilized to spread waste.").

96 *Evaluation of Snow Disposal into Near Shore Marine Environments*, report prepared for DEC by CH2M HILL (June 2006).

coal is therefore directly discharged into the pond. A CWA permit is also required for this discharge.

VI. CONCLUSION

For these reasons, Plaintiffs' motion for summary judgment should be granted. This Court should issue an order granting summary judgment on Plaintiffs' First, Second and Third Claims, declare Defendants in violation of the CWA for their ongoing unlawful and unpermitted discharges of pollutants from multiple point sources within the SCLF into waters of the United State and find the Defendants to have committed at least 357 violations of the CWA. In addition, the Court should grant injunctive relief requiring Defendants to (1) apply for and obtain a CWA NPDES permit for the discharges from the SCLF within 90 days of the date of the Court's order; (2) provide monthly status reports to Plaintiffs on the progress of this permitting process; and (3) notify Plaintiffs and the Court when the permits are issued. The Court should also award Plaintiffs' reasonable attorneys' fees and costs.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 14, 2012, a copy of the **Plaintiffs' Memorandum of Point and Authorities in Support of Motion for Summary Judgment** was served electronically upon:

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